IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 15845 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE N.G.NANDI

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

AFROZ @ NANU @ GUDDU @ AKKU S/O MAQBOOL AHMED KHAN

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 15845 of 2003

MR MM TIRMIZI for Petitioner No. 1

MR. L.R. PUJARI, LD. AGP for Respondent No. 1-3

RULE SERVED for Respondent No. 1-2

CORAM : HON'BLE MR.JUSTICE N.G.NANDI

Date of decision: 20/02/2004

ORAL JUDGEMENT

1. In this petition under Article 226 of the

Constitution of India the petitioner has been challenging the order of detention No: PCB/PASA/147/2003 dated 26-8-2003 (Annexure-A) passed under section 3 (1) of Prevention of Anti Social Activities Act of 1985 (For the short 'the Act') by respondent No.2 and prays for quashing and setting aside of the same.

2. In the grounds of detention (Annexure-B) dated 26-8-2003 it is alleged that the petitioner is a cruel person and along with his associates he has been possessing deadly weapons and has been administering threats to the residents in the city of Surat with whom he does not have any business relations, and has been extorting money from business people with a view to enrich himself and his associates; that the said acts of the petitioner detenu has the potentiality of endangering the public order and people at large has been entertaining the feeling of insecurity. In the grounds of detention one case registered on 22-4-2003 for the offence under section 386, 307, 120B I.P. Code and section 25 (1) of the Arms Act, and section 135 of the Bombay Police act has been referred to. The grounds of detention also refers to the statements of two witnesses recorded on 10-8-2003 and 11-8-2003 respectively. It is also suggested from the grounds of detention that the privilege under section 9 (2) of the Act has been invoked for withholding identity of the witnesses for the reason of apprehension to the person and property of the witnesses. It is also suggested that the statement of the witnesses have been verified and it is found that the contents of the statements of the witnesses and the fear of safety to the person and property of the witnesses have been found to be true and therefore, the identity of the witnesses have been withheld in public interest under section 9 (2) of the Act. Thus according to the grounds of detention petitioner is a 'dangerous person, within the meaning of section 2 (c) of the Act and therefore the order of detention under section 3 (1) of the Act against the petitioner.

3. The order of detention (Annx.A) has been challenged on the grounds of; (i) that the detention order Annexure-A is passed after more than four months and four days and that the said order on the ground of delay is vitiated in as much as the case was registered against the petitioner on 22-4-2003 whereas the detention order has been passed on 26-8-2003; (ii) that requirements of section 9 (2) of the Act have not been complied with in as much as there is no subjective satisfaction reached by the detaining authority as regards the genuineness of the statements of the

witnesses of 10-8-2003 and 11-8-2003; (iii) that there is no contemporaneous material as regards verification of the veracity of the incidents for which the statements of 10-8-2003 and 11-8-2003 have been recorded; (iv) that the solitary offence is not sufficient to conclude that the petitioner is a dangerous person and that he has been habitually indulging in the activities which are prejudicial to the maintenance of public order and; (v) that the representation made by the petitioner has not properly considered by the State Government, since there is no inquiry made into the allegations levelled against the petitioner in the grounds of detention.

4. It is submitted by Mr. L.R. Pujari, learned AGP that; (i) the impugned order (Annexure-A) is not only on the solitary registered case but also taking into consideration the statements of the witnesses recorded on 10-8-2003 and 11-8-2003 and the detention order does not suffer from the vice of delay as the petitioner was arrested by police in connection with the registered case and an order to release the petitioner on bail was granted on 3-8-2003 but the petitioner did not avail the bail as he did not comply with the conditions imposed by the court concerned; (ii) that the subjective satisfaction as required under section 9 (2) for invoking the privilege is in accordance with the requirement of law in as much as the veracity of the incident has been verified from the contemporaneous material available, and the contemporaneous material available was the FIR of the registered case, panchnama and the statements of the witnesses recorded in the registered case, statements of the co-accused etc. (iii) that even a solitary incident can be a basis for passing order under section 3 (1) of the Act if the same has the potentiality of disturbing the even tempo of the society and the same would be an act against the maintenance of public order.

5. Taking up the contention as regards the want of proper consideration of the representation dated 10-10-2003 (Annexure-C) by the father of the petitioner by making inquiry into the allegations made in the grounds of detention and the denial of the same in the said representation, it may be seen that the copy of the representation dated 10-10-2003 is at page-24 of the paper book. At page 26 it has been stated as follows :-

> "... I had personally visited the place of incident and personally inquired into the alleged incident on 7th October 2003 in the evening from the local residents, shopkeepers and businessmen as well as pan stall holders. It is alleged in

the statement that the witness was going to his customers for the business purpose on that day at around 7 in the evening and when he was passing through cross road at Rander Police Station area he was stopped by the Taiyab who was standing their with his associates namely (1) Mohammed Haroon (2) Shakil Ahmed (3) Mohammed Sadab with their Sumo Car. The witness was being inquired by the Taiyab regarding his business and expansion of the business. He further told him that they had never been paid by him and thereafter-demanded five lac rupees and also threatened him..... But on personal inquiry at the spot of the incident I found that no such incident had actually taken place. "

The said representation is supported by affidavit, copy whereof is at page-28.

6. In the petition in ground (k) it has been stated that the father of the petitioner, namely Maqbool Ahmedkahn Abdul Aziz Khan had sent representation dated 10-10-2003 (Annexure 'C') to the Police Commissioner, Surat City, respondent no.2 herein by Registered post A.D. In the said representation the father of the petitioner had mentioned that he had personally visited and inquired at the place of alleged unregistered offence as mentioned in the statement of the anonymous witness. On inquiry it was revealed that no such incident had taken place as alleged by the anonymous witness. This fact is stated on oath and the affidavit to that effect has been annexed with the representation. It was requested that the alleged incident be investigated into and the impugned order be revoked. (emphasis supplied)

7. The representation forwarded to the detaining authority has been forwarded to the State Government for consideration. The affidavit in reply filed on behalf of respondent no.1 State is placed on record. In para-4 thereof it has been stated as under:-

"4. With reference to ground (k) in para 4 of the petition, I respectfully say and submit that the representation dtd. 10.10.2003 addressed to the Commissioner of Police, Surat City was received in PASA Section of Home Department on 18.10.2003 alongwith the Commissioner of Police, Surat's letter dtd. 16.10.2003. There was public holiday on 19.10.2003. Hence, the said representation was processed by the PASA Section on 20.10.2003 and submitted it to the Deputy

Secretary (Law & Order), who cleared the file on 21.10.2003. Then the file was submitted to the Principal Secretary (Home), who after due consideration, rejected it on 22.10.2003. The detenu was informed about the said rejection vide Home Department's letter dated 23.10.2003. As such, the representation was considered expeditiously. The contention raised in this ground has no substance. "

8. The file of the respondent no.1 has been placed for my perusal. The same contains the representation dated 10-10-2003 by the father of the petitioner but the original of the affidavit page-28 is not to be found in the file of the State Government. The file of respondent no.2 the detaining authority has also been placed for my perusal. It is suggested that the representation dated 10-10-2003 by the father of the petitioner is supported by the affidavit filed him. Meaning thereby, the detaining authority did not send original or copy of the affidavit filed by father of the detenu in support of his representation dated 10-10-2003 but only forwarded the representation dated 10-10-2003 filed by father of the petitioner. Thus it would be seen that in the affidavit in reply in para-4 filed by the State, the averments made in the ground (k) of the petition and the representation dated 10-10-2003 have not been dealt with at all.

9. On behalf of the petitioner reliance has been placed on the decision in the case of HARIJAN GOVIND JADAV v. STATE OF GUJARAT & ORS., 1987 (1) GLR pg. 216, it has been held that the detenu has a right to make representation and the government is under a duty to consider the representation. This is not an empty formality. Failure to consider the same vitiates the order of detention.

In para-6 it has been observed by the Division Bench as under :-

" Making of a representation and its consideration by the appropriate Government are not mere empty formalities. It being a matter of liberty of a citizen and it being a matter of an obligation under Article 22 (5) of the Constitution, it becomes the duty of the appropriate Government to apply its mind to the representation before rejecting the same. Mere rejection of a representation is not consideration of it. As it was pointed out in the representation that the grounds really did

not exist in the sense indicated above, it was the duty of the State Government to enquire into that aspect ad find out if there was any substance in the said allegation. No attempt in that behalf was made by the State Government and that clearly shows lack of awareness of its constitutional obligation. That powers conferred under detention laws are coupled with duties also appears to have been forgotten. The State Government is required to be reminded that discharging those duties is equally necessary as exercising the power conferred upon it. "

In the instant case it is not suggested that any attempt whatsoever is made by the State Government to find whether there is any substance in the allegation about the occurrence having taken place, contained in the representation dated 10-10-2003. Neither the affidavit filed by the respondent State Government say that any attempt having been made to inquire into the veracity of the incident alleged in the grounds of detention and denied in the representation dated 10-10-2003 (Annexure-'C').

10. In view of the facts emerging from the record and especially considering the affidavit in reply filed by the State as well as the detaining authority, the representation of the petitioner dated 10-10-2003 cannot be said to have been considered properly in accordance with the requirements as laid down in the case of Harijan Govind Jadav (supra) by the Division Bench of this Court and for this reason the detention order is liable to be quashed and set aside. Since the petition is decided on the ground of proper consideration of representation Annexure'C', I do not think it necessary to go in to the contentions challenging the detention order on other grounds.

11. In the result, the petition is granted and accordingly allowed. The impugned detention order No: PCB/PASA/147/2003 dated 26-8-2003 (Annexure-A) passed under the Prevention of Anti Social Activities Act, 1985 by Respondent No.2 is quashed and set aside. The petitioner detenu - Afroz @ Nanu @ Guddu @ Akku, S/o Maqbool Ahmedkhan is ordered to be set at liberty forthwith, if not required in any other case. Rule is made absolute accordingly. Direct service permitted.

12. It is a matter of regret that in a serious matter like this the detaining authority for the reasons best known to it did not send the affidavit in support of the

representation dated 10-10-2003 filed by the father of the petitioner and only chose to send the representation. Looking to the gravity of the matter the State Government may look into the matter and do the needful, so that such thing is not repeated in other cases.

Dt: 20-2-2004 (N.G. Nandi, J)

/vgn